

1
2 UNITED STATES BANKRUPTCY COURT
3 EASTERN DISTRICT OF CALIFORNIA
4 FRESNO DIVISION

5 In re) Case No. 16-11072-B-13
6 Ellyn D. Lopez,) DC No. MHM-1
7 Debtors.)
8 _____)

9
10 **MEMORANDUM DECISION REGARDING OBJECTION**
11 **TO CONFIRMATION OF CHAPTER 13 PLAN**

12 Deanna Hazelton, Esq., appeared on behalf of the chapter 13
13 trustee, Michael H. Meyer, Esq. Patrick Kavanagh, Esq., appeared
14 on behalf of the debtor, Ellyn D. Lopez (the "Debtor" or
15 "Lopez").

16 **Introduction**¹

17 The "cobra effect" is the unintended consequence of a
18 blanket rule. The serpent slithers and coils around the
19 allowable expenses debtors may use to determine their "projected
20 disposable income" under 11 U.S.C §§ 1325(b)(2) and 707(b)(2)(A)
21 and (B). When the broad sweep of a rule results in too much
22 "human ingenuity," the cobra effect arises and the serpent
23 strikes. The bankruptcy court then tames the snake, applies the
24 law, and determines whether the debtor or creditor loses. This

25 _____
26 ¹ This memorandum decision contains the court's findings of fact and
27 conclusions of law required by Federal Rule of Civil Procedure 52(a), made
28 applicable to this contested matter by Federal Rules of Bankruptcy Procedure
7052 and 9014(c). The court has jurisdiction over this matter under 28
U.S.C. § 1334, 28 U.S.C. §'s 157 (a) and (b) and General Order Nos. 182 and
330 of the U.S. District Court for the Eastern District of California.

1 case shows the importance of the bankruptcy court keeping the
2 keys to the cobra's den.

3 **Background and Findings of Fact.**

4 According to the record in the main docket and the related
5 dischargeability complaint filed by a major unsecured creditor
6 (AP# 16-01073),² the Debtor was propelled into this case by a
7 series of internet financial transactions in 2015.³ The Debtor
8 filed her chapter 13 bankruptcy case on March 30, 2016, with all
9 schedules and a chapter 13 plan. The Debtor has worked as an
10 LVN approximately 11 years for one employer, and now has a
11 second job. From both jobs her gross income totals \$6,561 per
12 month, \$5,046 after taxes, and her total expenses are \$3,631.
13 Her net income is \$1,415, which is the amount she proposes as a
14 monthly plan payment.

15 The Debtor's schedules show that her two young adult sons
16 live with her as dependents, that she owns a home, three
17 vehicles, and few other assets. She pays \$775 per month on a
18 loan secured by a first deed of trust encumbering her home with
19 a balance of \$53,687. Her home has a fair market value of
20 approximately \$190,000. She pays \$462 per month on a loan
21
22

23 ² That adversary proceeding was settled by a stipulated judgment entered
24 August 3, 2017.

25 ³ There does not appear to be any dispute regarding the facts underlying
26 this case as recited in the complaint in the AP: The Debtor was a victim of
27 fraud when, in April 2015, she joined a dating website and began to
28 communicate with "Tyler Nunez." Subsequently she made arrangements to marry
"Nunez." He instructed her to empty her IRA and wire him the money, resulting
in her priority tax debt. When he told her he needed more money, assuring
her he would repay the loan, she incurred much of the secured and unsecured
debt listed in her case.

1 secured by a second deed of trust which secures \$86,179.⁴ The
2 Automobile, a 2005 Toyota Highlander, is valued at \$10,486. and
3 is encumbered by the Automobile Loan in the amount of \$13,586.⁵
4 The Debtor contends the Automobile is worth less.⁶ The Debtor's
5 average monthly payment on the Automobile Loan over the 60 month
6 term of the plan is \$256.38.⁷ The other automobiles are
7 unencumbered and are valued at less than \$8,400. Her total
8 personal and household items are valued at \$1,400. and her total
9 financial assets, including an annuity, are valued at \$28,029.

10
11
12 ⁴ The Debtor's junior deed of trust was obtained as one in the series of
loans she obtained related to the internet transactions with "Nunez."

13 ⁵ The Debtor obtained her re-finance loan on the Automobile from
14 Springleaf Financial Services. Although non-purchase money loans secured by
15 cars are sometimes known as "Car Title Loans," the Automobile Loan falls in a
16 different category. A "Title Loan" is defined as, "A short-term loan in which
17 the borrower's car title is used as collateral. The borrower must . . . (own
18 the car outright). Loans are usually for less than 30 days. If the loan is
19 not repaid, the lender can take ownership of the car and sell it to recoup
20 the loan amount. These loans are also known as "auto title loans" or just
21 'title loans'. Car title loan lenders often target those with low incomes and
22 bad credit and charge high interest rates; those with access to credit cards
23 or bank loans would not be the target customers. Car title or auto title
24 lenders are sometimes called 'predatory lenders' because of the way in which
they prey on those who need cash in emergency situations. Although lenders
must state the interest rate at the time the loan is made, if it is a
short-term loan, the borrower may not realize that the quoted rate is not
annualized. For example, if a one-month loan rate is advertised at 25%, that
annualized rate is actually 300%."

22 <http://www.investopedia.com/terms/c/car-title-loan.asp> (Last visited August
23 26, 2017). In the Debtor's case the Automobile Loan resembles a home equity
24 loan more than the "title loan" described here. The Automobile Loan was for
an amount that appears to actually exceed the Automobile's fair market value,
the Automobile Loan is not short-term, and the payments are substantial.

25 ⁶ The Debtor's chapter 13 plan shows that she intends to file a motion
26 to value the collateral and pay the creditor through the plan based on the
Automobile's value.

27 ⁷ At issue here is whether the nature of the Automobile Loan as an
28 equity loan rather than for purchase money changes its character as an
"applicable amount" under *Ransom*, (*infra*) for the purposes of the Means Test.

1 The Debtor has general and priority unsecured debt. Her
2 non-priority unsecured debt totals \$286,971, virtually all of
3 which are debts for personal loans.⁸ The Debtor has priority tax
4 claims for the year 2015 owed to the California Franchise Tax
5 Board in the amount of \$9,985 and to the Internal Revenue
6 Service in the amount of \$33,730. Apparently both arise from the
7 2015 withdrawal of \$68,225 from her pension fund. Also in 2015,
8 the Debtor closed out six bank accounts which had a total
9 balance of \$23,889.

10 **Issues Presented.**

11 1. Whether a debtor has an “applicable amount” for purposes
12 of the Means Test’s vehicle-ownership expense deduction when the
13 debt secured by the vehicle is a refinance loan and not a
14 purchase-money loan.

15 2. Whether the vehicle-ownership expense of §707(b) is a
16 “cap” or an “allowance.”

17 **The Parties’ Contentions**

18 The Debtor contends she has an “applicable amount” for
19 “Means Test” purposes since she is required to make payments on
20 a car loan, notwithstanding that the loan is not a purchase
21 money loan. She also contends that the standard “vehicle
22 ownership expense” is an allowance and available for those
23 debtors with “applicable” expenses.

24 The chapter 13 trustee, Michael H. Meyer, Esq. (the
25 “Trustee”) objects to confirmation of the debtor’s proposed
26 chapter 13 plan (the “Objection”), based on the grounds that

27
28 ⁸ Also listed is approximately \$2,000 owed for ambulance service and
some credit card debt.

1 §1325(b)(1)(B) requires all of the Debtor's "projected disposable
2 income" to be applied to payments to unsecured creditors under
3 the plan. The Objection hinges on whether payments on the loan
4 (the "Automobile Loan") secured by the Debtor's automobile (the
5 "Automobile") are a deductible "ownership expense." The Trustee's
6 position raises two issues of apparently first impression in the
7 Ninth Circuit- if the Automobile Loan was not used to *purchase*
8 the Automobile, but instead was an equity loan *secured by* the
9 Automobile, is the Debtor entitled to use the "vehicle-ownership
10 expense" on Official Form 122C-1 (the "Official Form" or the
11 "Means Test") as a deduction from her projected disposable
12 income? If so, the Debtor's plan payments are sufficient. The
13 second issue is should the amount specified as the vehicle-
14 ownership expense provided for by §707(b) be treated as a "cap"
15 or as an "allowance?" If a "cap," then the Debtor may deduct
16 only her actual payment. If an "allowance," then the full
17 amount of the "vehicle-ownership expense" may be deducted.

18 The court is not persuaded by the Trustee's arguments and
19 authority and holds that in this case, the Debtor can use the
20 "vehicle-ownership expense." The court also holds that the
21 "vehicle-ownership expense" is an "allowance" and not a "cap."

22 There is no disagreement as to the material facts,
23 including that the Debtor properly completed the Official Form.
24 The Trustee argues that the instructions are inconsistent with
25 the Bankruptcy Code and that the Official Form should be
26 completed in a different manner. Because the court is required
27 to interpret the Official Form to be consistent with the Code
28 and Ninth Circuit authority and because this interpretation

1 results in a reasonable conclusion that is not inconsistent with
2 any binding authority, the Objection will be overruled.

3 **Analysis and Conclusions of Law.**

4 In 2005 the Bankruptcy Abuse Prevention and Consumer
5 Protection Act of 2005, Pub. L. 109-8, Apr. 20, 2005, 119 Stat.
6 23 ("BAPCPA") was enacted "to correct perceived abuses of the
7 bankruptcy system." *Milavetz, Gallop & Milavetz, P.A. v. United*
8 *States*, 559 U.S. 229, 231-32 (2010). BAPCPA changed prior law
9 by requiring chapter 13 debtors with incomes that are "above-
10 median" to calculate the amount of disposable income available
11 for repayment of unsecured creditors differently than "below-
12 median" income debtors. After calculating their monthly income,
13 the "above-median" income debtor subtracts expenses and payments
14 on secured debt to arrive at "disposable income" available as a
15 dividend to unsecured creditors. Under BAPCPA, some of the
16 expenses deducted from the debtor's income are *actual* expenses,
17 while others are drawn instead from an external schedule of
18 "allowable" expenses devised by the Internal Revenue Service.
19 These "allowable" expenses have been deemed by BAPCPA to be
20 "necessary" to the support of the debtor and the debtor's
21 dependents. The "allowable" expenses relevant here are those
22 for transportation.

23 This "external schedule" is used for both the "presumed
24 abuse" test for chapter 7, and the "projected disposable income"
25 plan payment test in chapter 13. The "external schedule" is a
26 table of expenses developed and updated by the Internal Revenue
27 Service Agency ("National Standards," "Local Standards," or
28 "Standards"). These Standards were developed for use by IRS

1 agents when evaluating offers in compromise from tax payers.
2 The IRS also created guidelines for the agents' use of the
3 Standards. These are set forth in Internal Revenue Manual,
4 Financial Analysis Handbook §5.15.1.7-5.15.1.10 (the "IRM")
5 https://www.irs.gov/irm/part5/irm_05-015-001.html (all websites
6 last visited August 26, 2017).

7 The Means Test "result" may cause a chapter 7 bankruptcy
8 case to be dismissed for "presumed abuse,"⁹ or for abuse under the
9 "totality of the circumstances."¹⁰ A chapter 7 or 13 case can be
10 dismissed for bad faith,¹¹ and a chapter 13 plan can be denied
11 confirmation for bad faith¹² or for failure to provide payment of
12 all projected disposable income during the term of the plan.¹³

13 ⁹ Section 707(b)(2). While the Debtor's case was filed under chapter
14 13, the analysis of §707(b)(2) as it applies to a chapter 7 case can aid in
understanding the application of the Standards.

15 ¹⁰ *In re Ng*, 477 B.R. 118 (9th Cir. BAP, 2012) ("Section 707(b)(1) and
16 (3)(B) of the Bankruptcy Code operate in tandem to allow a bankruptcy court
17 to dismiss a chapter 7 case for abuse of the bankruptcy process based on the
totality of the circumstances."

18 ¹¹ *In re Leavitt*, 171 F.3d 1219, 1224 (9th Cir. 1999) ("Cause' for
19 dismissal under § 349 has not been specifically defined by the Bankruptcy
20 Code. For Chapter 13 cases, §§ 1307(c)(1) through (10) provide that the
21 bankruptcy court may convert or dismiss, depending on the best interests of
the creditors and the estate, for any of ten enumerated circumstances.
Although not specifically listed, bad faith is a "cause" for dismissal under §
1307(c)." *Citations omitted.*)

22 ¹² A case must be filed in good faith, §1307(c), §1325(a)(7), and the
23 plan must be proposed in good faith, §1325(a)(3).

24 One of the requirements for confirmation of a chapter 13
25 plan is that it be proposed in good faith. §1325(a)(3). "Good
26 faith" is not defined in the Bankruptcy Code. The Ninth Circuit
27 has held that "the proper inquiry is whether the [debtors] acted
28 equitably in proposing their Chapter 13 plan." *Goeb v. Heid (In re Goeb)*, 675 F.2d 1386, 1391 (9th Cir. 1982). In making that
inquiry, the court applies a "totality of the circumstances" test,
taking into consideration (1) whether the debtor misrepresented
facts, unfairly manipulated the Bankruptcy Code or otherwise
proposed the plan in an inequitable manner; (2) the history of
the debtor's filings and dismissals; (3) whether the debtor

1 In the decade-plus since the enactment of BAPCPA, many of
2 the issues that have arisen under §707(b) have been resolved
3 through statutory amendment and precedential case law. For this
4 reason it should be seldom necessary to go further than the
5 Code, the rules, the Official Form, and case law to decide the
6 presumption of abuse or projected disposable income issues.
7 Likewise, unless it is strictly necessary to do so, resort to
8 the IRM for guidance is seldom appropriate and rarely helpful.
9 Here, the court has found it unnecessary to venture beyond the
10 plain meaning of §707(b), the Official Form supplemented with
11 corroborating legislative materials, and court decisions.

12 **I. Introduction to the BAPCPA Means Test.**

13 Much has been written about the inner workings of §707(b)(2)
14 which was implemented as part of BAPCPA, including many
15 published opinions within the Ninth Circuit.¹⁴ In chapter 7
16 bankruptcy cases debtors turn over all non-exempt property to a
17 chapter 7 trustee for sale and distribution to unsecured
18 creditors and walk away with their exempt property and a fresh

20 intended only to defeat state court litigation; and (4) whether
21 the debtor's behavior was egregious. *Leavitt*, 171 F.3d at 1224
(applying same factors for good faith filing of chapter 13
22 petition).

23 *Drummond v. Welsh (In re Welsh)*, 465 B.R. 843, 851 (9th Cir. BAP 2012) (*aff'd*,
In re Welsh, 711 F.3d 1120 (9th Cir. 2013).)

24 ¹³ Section 1325(b)(1)(B).

25 ¹⁴ Notably, *In re Welsh*, 711 F.3d 1120 (9th Cir. 2013); *In re Egebjerg*,
26 574 F.3d 1045 (9th Cir. 2009); *In re Kagenveama*, 541 F.3d 868 (9th Cir. 2008)
(*overruled en banc by, In re Flores*, 735 F.3d 855, 858-59 (9th Cir. 2013));
27 *In re Ransom*, 577 F.3d 1026 (9th Cir. 2009) (*aff'd* 562 U.S. 61 (2011)), one
28 of the most recent being, *In re Keller*, 568 B.R. 118 (9th Cir. BAP 2017),
explaining the interplay of the automatic stay, BAPCPA, and enforcement of
domestic support obligations.

1 start. Prior to BAPCPA, the expenses of all chapter 7 debtors
2 were examined under a "reasonable and necessary" standard. The
3 determination of whether a case had been filed in good faith, or
4 whether granting a chapter 7 discharge would be a "substantial
5 abuse" of the Bankruptcy Code, was delegated by the Code to the
6 discretion of the bankruptcy court.¹⁵ If the court determined
7 that the chapter 7 debtors had, or should have had, a net income
8 that could be devoted in a chapter 13 to repaying creditors,
9 then those debtors were faced with the choice of dismissal of
10 their chapter 7 case or voluntary conversion of their cases to
11 chapter 13. In the case of a chapter 13 reorganization, the
12 issue before the court was whether or not the amount devoted to
13 plan payments was sufficient under the circumstances of the
14 case. Leaving to the court's discretion recognition of
15 "abusive" chapter 7 cases or the sufficiency of unsecured
16 creditors' dividends in chapter 13 led to widely varied
17 outcomes. In its effort to impose homogeneity, Congress amended
18 the chapter 7 dismissal statute, §707(a) and (b), adding, *inter*

19
20 ¹⁵ Before BAPCPA was enacted §707 read in pertinent part:

21 (a) The court may dismiss a case under this chapter only after notice
22 and a hearing and only for cause, including--

23 (1) unreasonable delay by the debtor that is prejudicial to creditors;
24 (2) nonpayment of any fees or charges required under chapter 123 of
25 title 28; and

26 (3) failure of the debtor in a voluntary case to file, within fifteen
27 days or such additional time as the court may allow after the filing of the
28 petition commencing such case, the information required by paragraph (1) of
section 521, but only on a motion by the United States trustee.

(b) After notice and a hearing, the court, on its own motion or on a
motion by the United States trustee, but not at the request or suggestion of
any party in interest, may dismiss a case filed by an individual debtor under
this chapter whose debts are primarily consumer debts if it finds that the
granting of relief would be a substantial abuse of the provisions of this
chapter. There shall be a presumption in favor of granting the relief
requested by the debtor.

1 *alia*, §707(b)(2)-(3) (made applicable to chapter 13 cases by
2 §1325(b)). Section 707(b)(2) substituted the previous judicial
3 discretion model with the mandatory application of the
4 Standards. This uniform set of standard expenses now guides the
5 “disposable income” inquiry. This homogeneity has shortcomings
6 as pointed out in *Ransom v. FIA Card Services, N.A.*, 562 U.S.
7 61, 70 (2011),¹⁶ where the Supreme Court noted,

8
9 [The debtor] . . . points out a troubling
10 anomaly: Under our interpretation, “[d]ebtors can time
11 their bankruptcy filing to take place while they still
12 have a few car payments left, thus retaining an
13 ownership deduction which they would lose if they
14 filed just after making their last payment.” Brief for
15 Petitioner 54. Indeed, a debtor with only a single car
16 payment remaining, [the debtor] notes, is eligible to
17 claim a monthly ownership deduction. *Id.*, at 15, 52.
18 But this kind of oddity is the inevitable result of a
19 standardized formula like the means test Such
20 formulas are by their nature over- and
21 under-inclusive. *In eliminating the pre-BAPCPA*
22 *case-by-case adjudication of above-median-income*
23 *debtors' expenses, on the ground that it leant itself*
24 *to abuse, Congress chose to tolerate the occasional*
25 *peculiarity that a brighter-line test produces.”*

26 *Id.*, *emphasis added*.

27 After the enactment of BAPCPA the Committee on Rules of
28 Practice and Procedure of the Judicial Conference of the United
States (the “Committee”) developed Official Forms¹⁷ to implement

25 ¹⁶ After *Ransom*, the Supreme Court decided *Hamilton v. Lanning*, 560 U.S.
26 505 (2010) approving the power of the bankruptcy courts to alter the
27 bright-line application of the Means Test in chapter 13 cases where,
pre-confirmation, a change in financial circumstances was certain, or
virtually certain, to occur during the term of the plan.

28 ¹⁷ Currently Official Forms 122B and 122C.

1 §707(b)(2). The relevant provisions of this section have not
2 changed since that time. In a chapter 7 the Official Form, or
3 Means Test, requires debtors to respond to a questionnaire.
4 Responses determine whether relief in a case would be "presumed
5 abuse" of the Bankruptcy Code. For chapter 13 debtors the
6 responses determine the amount of disposable income the debtors
7 have to pay to unsecured creditors in the plan.

8 The first determination in the Means Test is the
9 debtors' income. Debtors are separated into one of two
10 categories: above-median income, and below-median income.
11 Below-median income debtors are finished with the Official
12 Form when their income is scheduled and can rest somewhat
13 assured, a chapter 7 case will not be dismissed for abuse,
14 and a chapter 13 plan will not draw objections to
15 confirmation based on the disposable income test.¹⁸

16 All above-median income debtors, however, must
17 continue on to complete the expense section of the Means
18 Test where they are led through a series of questions
19 designed to implement the provisions of §707(b)(2).¹⁹ For
20 these debtors, deduction of some expenses from income are

21 ¹⁸ After this determination a case cannot be dismissed for §707(b)(2)
22 "presumed abuse," but only for abuse under the §707(b)(3) "totality of the
23 circumstances."

24 ¹⁹ The use of BAPCPA's §707(b) is different for chapter 7 and chapter 13
25 debtors. For the chapter 13 debtor the statute is used to reveal a debtor's
26 "projected disposable income" which must be devoted to plan payments. In
27 this two-step process, disposable income is first calculated and, second, the
28 "disposable income is projected into the future and any appropriate
adjustment is made." *In re Denzin*, 534 B.R. 883, 887 (Bankr. E.D. VA. 2015).
In a chapter 7 case the Means Test serves to "distinguish the honest but
unfortunate debtor who is entitled to chapter 7 relief from the honest but
less unfortunate debtor who is capable of repaying all or part of his debts
and who is not entitled to chapter 7 relief." *Id.* *Emphasis added.*

1 based on their actual expenses, for other expenses the
2 amount deducted is "deemed" as an "applicable expense" based
3 on the Standards.

4 The Standards and §707(b)(2). A digression is
5 necessary to explain the table of expenses (the IRS
6 Standards), that were incorporated into the Bankruptcy Code
7 by the new subsection §707(b)(2). The IRS's application of
8 the Standards and their application by the Bankruptcy Code
9 are not similar; reference to the IRM is risky for this
10 reason. The Standards were designed to provide guidance
11 for *IRS agents* when they consider offers in compromise from
12 taxpayers.

13 The Secretary of the Internal Revenue Agency (the
14 "Secretary") is directed, in 26 U.S.C.A. §7122(d)(1), to
15 "prescribe guidelines for [IRS agents] to determine whether
16 an offer-in-compromise is adequate and should be accepted
17 to resolve a dispute." The instructions to the Secretary in
18 26 U.S.C.A. §7122 (d)(2)(A) and (B) show that these
19 "guidelines" are not meant to reach the same *uniform result*
20 that was one of the primary purposes of BAPCPA:

21
22 (2) Allowances for basic living expenses.--

23 (A) In general.--In prescribing guidelines under
24 paragraph (1), the Secretary shall develop and publish
25 schedules of national and local allowances designed to
26 provide that taxpayers entering into a compromise have
27 an adequate means to provide for basic living
28 expenses.

(B) Use of schedules.--The guidelines shall
provide that officers and employees of the Internal
Revenue Service shall determine, *on the basis of the*
facts and circumstances of each taxpayer, whether the
use of the schedules published under subparagraph (A)

1 *is appropriate* and shall not use the schedules to the
2 extent such use would result in the taxpayer not
3 having adequate means to provide for basic living
4 expenses.

5 *Id.*, *emphasis added*.

6 In contrast, BAPCPA's incorporation of the Standards in
7 §707(b) was intended to remove discretion from bankruptcy
8 courts in applying the statute in chapter 7 and 13 cases.
9 The only reference in the Bankruptcy Code to the Internal
10 Revenue Service's Standards is in a single sentence in
11 §707(b)(2)(A)(ii)(I). Since BAPCPA, courts have struggled
12 to apply the statute's effects. The incorporation of the
13 amounts stated in the Standards was not meant to drag in
14 other IRS materials (*see, In re Kimbro*, 389 B.R. 518, 527-
15 28 (6th Cir. BAP 2008), *rev'd and remanded on other*
16 *grounds*, 409 F. App'x 930 (6th Cir. 2011). The Standards
17 were created by the Secretary for a purpose inconsistent
18 with Congress's purpose to limit allowable debtor
19 expenses.²⁰

20 To begin with, significant differences distinguish the
21 expenses permitted for *taxpayers* by the IRS and those
22 permitted for *debtors* in bankruptcy. One example is
23 tithing, specifically permitted by the Bankruptcy Code in
24 §544, §707(b)(1) and (b)(2), but allowed under the IRS

25 ²⁰ Indeed, the IRS now posts a disclaimer on its page stating: "IRS
26 Collection Financial Standards are intended for use in calculating repayment
27 of delinquent taxes. These Standards are effective on March 28, 2016 for
28 purposes of federal tax administration only. Expense information for use in
29 bankruptcy calculations can be found on the website for the U.S. Trustee
30 Program." ([https://www.irs.gov/businesses/small-businesses-self-
employed/collection-financial-standards](https://www.irs.gov/businesses/small-businesses-self-employed/collection-financial-standards))

1 collection standards as “reasonable and necessary” expenses
2 only if the taxpayer can pay their taxes in full within
3 five years. *George Thompson v. Commissioner*, U.S. Tax
4 Court, CCH Dec. 59,469, 140 T.C. No. 4, (Mar. 4, 2013) (The
5 court found it was reasonable to interpret “health and
6 welfare” as *not* including petitioner's “spiritual” health and
7 welfare).

8 Secondly, courts have refused to permit expenses for
9 *debtors* which are, however, allowed for *taxpayers* by IRS
10 agents. The court pointed this out in *In re Luedtke*, 508
11 B.R. 408, 414 (9th Cir. BAP 2014), deciding that debtors
12 were not entitled to take a \$200 per month “older vehicle
13 operating expense,” because this expense is not listed in
14 the Standards or in the commentary to the Standards. IRS
15 agents, however, may permit this expense when evaluating
16 offers of compromise by taxpayers. *Id.*

17 Thirdly, while the IRS instructions for the Standards
18 direct a taxpayer to use the Standard or actual amount,
19 “whichever is less,”²¹ agents do have discretion under the

20 ²¹ The IRS website, under Local Standards for California:
21 Housing and Utilities, states: “The taxpayer is allowed the standard amount,
22 or the amount actually spent on housing and utilities, *whichever is less*. If
23 the amount claimed is more than the total allowed by the housing and
24 utilities standards, the taxpayer *must provide documentation* to substantiate
25 those expenses are necessary living expenses.” *Emphasis added*. In other
26 words, if the amount is equal or less that the Standard amount, no
27 documentation is necessary. If the amount is more, both documentation and
28 evidence of necessity (as stated in *Wilson v. C.I.R.*) is required.

Under Local Standards: Transportation, under Ownership Costs, the
website states: “For each automobile, taxpayers will be allowed *the lesser of*:
1. The monthly payment on the lease or car loan, or 2. The ownership costs
shown in the table below.” *Emphasis added*. Documentation of actual amounts
in excess of the Standard amount is also required of bankruptcy debtors,
however, as we see in *Wilson v. C.I.R.*, T.C. Summ. Op. 2013-18, 2013 WL
673161, at *5 (T.C. Feb. 25, 2013), IRS agents have the discretion to
disallow the overage. This is inconsistent with the Official Form which

1 statute to allow the taxpayer's actual expense when it
2 exceeds the Standards. An IRS agent may use the taxpayer's
3 actual expense or the amount listed in the Standard when
4 evaluating an offer-in-compromise and the agency decisions
5 are reviewed by the tax courts for abuse of discretion.

6 *See, Lindsay Manor Nursing Home, Inc. v. Commissioner of*
7 *Internal Revenue United States Tax Court*, T.C. Memo. T.C.
8 Memo. 2017-50, 2017 WL 1113299, Tax Ct. Rep. (CCH) 60,858,
9 113 T.C.M. (CCH) 1223, T.C.M. (RIA) 2017-050, 2017 RIA TC
10 Memo 2017-050 ("In its discretion, the IRS may accept an
11 installment agreement if it determines that doing so will
12 facilitate full or partial collection of a tax liability. .

13 . . . Consequently, in reviewing this determination, the
14 Court does not substitute its judgment for that of Appeals
15 and decide whether in its opinion petitioner's installment
16 agreement should have been accepted. Instead, the Court
17 reviews this determination for abuse of discretion."

18 *Citations omitted.*); *Lindley v. Commissioner*, U.S. Tax
19 Court, 92 T.C.M. (CCH) 363, T.C.M. (RIA) 2006-229, 2006 RIA
20 TC Memo 2006-229 (Oct. 2006) ("[I]t was not arbitrary or
21 capricious for [the agent] to use national and local
22 standards in determining petitioners' allowable housing and
23 utilities expense, including the second mortgage expense,"
24 instead of their actual expenses, because the taxpayer did

25
26 explicitly directs the debtor to enter those overage amounts in the "other
27 debts" section of the Official Form, thus showing logically that the Standard
28 is a cap. By now there is no doubt that it was Congress' intent that claims
secured by debtors' homes and vehicles, in addition to other collateral, be
paid. *Drummond v. Welsh (In re Welsh)*, 711 F.3d 1120, 1133 (9th Cir. 2013).

1 not show "they would be unable to provide for basic living
2 expenses if only allowed the national and local standards").

3 The Standards as used by the IRS is not how the Code
4 contemplates their use, since the Code clearly and unambiguously
5 reads, at §707(b)(2)(A)(ii)(I): "Amounts reasonably necessary
6 to be expended under paragraph (2) . . . *shall be* determined in
7 accordance with [the National and Local Standards], if the
8 debtor [is an above-median income debtor]. *Emphasis added.* A
9 court using the Standard amounts in the same manner they are
10 used by the IRS would nullify this statute by restoring judicial
11 discretion.

12 The Sixth Circuit BAP case, *In re Kimbro*,²² provides a
13 well-reasoned explanation of the difference in the use of the
14 Standards by the IRS and as they are incorporated into the
15 Bankruptcy Code.

16
17 The substantial discretion allowed to a revenue
18 officer under the IRM is inconsistent with the purpose
19 of the means test to adopt a uniform, bright-line test
20 that eliminates judicial discretion. Congress
21 intended that there be uniform and readily-applied
22 formula for determining when the bankruptcy court
23 should presume that a debtor's chapter 7 petition is
24 an abuse and for determining an above-median debtor's
25 disposable income in chapter 13. By explicitly
26 referring to the National and Local Standards,
27 Congress incorporated a table of standard expenses
28 that could be easily and uniformly applied; Congress
*intended that the court and parties simply utilize the
expense amount from the applicable column based on the
debtor's income, family size, number of cars and
locale. The amounts are entered into the means test
form and a determination of disposable income is*

²² Reversed and remanded as being inconsistent with *Ransom's*
"applicable" analysis.

1 *accomplished without judicial discretion. The clear*
2 *policies behind the means test were the uniform*
3 *application of a bright-line test that eliminates*
4 *judicial discretion. Plainly, Congress determined that*
5 *these policies were more important than accuracy.*
6 *However, if the IRM were used to determine the amounts*
7 *of expenses, as the trustee argues, the means test*
8 *would of necessity again be a highly discretionary*
9 *test, because under the IRM, a revenue officer is*
10 *afforded significant discretion in determining a*
11 *taxpayer's ability to pay a tax debt. Many paragraphs*
12 *illustrate this extent of this discretion, as the*
13 *extended list below demonstrates.*

14 *In re Kimbro, 389 B.R. 518, 527-28 (6th Cir. BAP 2008), emphasis*
15 *added, rev'd and remanded on other grounds, 409 F. App'x 930*
16 *(6th Cir. 2011).*

17 Following this paragraph in the *Kimbro* decision are
18 many examples of IRS agent discretion in interpreting the
19 Standards.

20 Returning to the Bankruptcy Code and the Means Test.

21 Section 707(b)(2)(A)(ii)(I), in pertinent part,
22 states:

23 The debtor's monthly expenses *shall be the*
24 *debtor's applicable monthly expense amounts specified*
25 *under the National Standards and Local Standards, and*
26 *the debtor's actual monthly expenses for the*
27 *categories specified as Other Necessary Expenses*
28 *issued by the Internal Revenue Service for the area in*
29 *which the debtor resides Notwithstanding any*
30 *other provision of this clause [I], the monthly*
31 *expenses²³ of the debtor shall not include any*
32 *payments for debts.*

33 *Id., emphasis added.*

34 ²³ It would have been more accurate to write, "Notwithstanding any other
35 provision of this clause [I], the monthly expense amounts of the debtor shall
36 not include any payments for debts."

1 Debtors are instructed in Part 1 of Official Form 122C
2 "Chapter 13 Calculation of Your Disposable Income,"
3 "Calculate Your Deductions from Your Income," to enter the
4 "amounts specified" under the "National and Local Standards"
5 (emphasis added). After entering their household size,
6 debtors are instructed to use the National Standards for
7 the amounts on: "Line 6. Food, clothing, and other items;
8 Line 7. Out-of-pocket health care allowance."

9 For Lines 8-15, debtors are instructed to use the IRS
10 Local Standards. Based on information from the IRS, the
11 USTP bisected the Local Standards into: "Insurance and
12 operating expenses," on Line 8, and "Mortgage or rent
13 expenses," on Line 9.²⁴ Thus, on Line 8 the debtor enters
14 the amount from the appropriate Standards category for
15 "Insurance and operating expenses," and this amount is
16 deducted from the debtor's income. On Line 9 the debtor
17 enters the amount from the Standards category for "Mortgage
18 or rent expenses." Next, on Lines 9a and 9b, the debtor
19 enters the actual average mortgage payment and "*other debts*
20 *secured by your home*." These debt amounts are subsequently
21 *deducted from the Standards amount* (with the result that "no
22

23 ²⁴ In bankruptcy, allowed secured claims either get paid or their
24 collateral is released; a chapter 13 debtor must propose a feasible plan;
25 and, courts are not allowed the breadth of discretion exercised by IRS agents
26 in evaluating offers-in-compromise. Without the USTP's separation of
27 housing-standard components, it would be possible for a debtor under the
28 Means Test to receive no deductions from income for utilities and insurance
if their mortgage payment exceeded the Standards. By zeroing out the unified
Standard amount a debtor, for example, might be unable to both satisfy the
Means Test and propose a feasible chapter 13 plan. Section
§707(b)(2)(A)(ii)(I) was an effort to apply a simple nondiscretionary standard
to the universe of debtors.

1 debt is included in the expenses, §707(b)). Therefore, if
2 these secured debts exceed the Standards amount, the
3 Standards amount listed on line 9c will be zero. The
4 entire *debt*, however, will be listed on Line 33,
5 regardless: “Deductions for Debt Payment: For debts that
6 are secured by an interest in property that you own,
7 including home mortgages, vehicle loans, and other secured
8 debt.” Alternatively, if these secured debts are less than
9 the Standard amount, there will be some amount on Line 9c
10 which will then be deducted from the debtor’s income and the
11 debt expenses deducted also on Line 33. This process
12 created by the Committee in drafting the Official Form both
13 conforms the Means Test with the statute and eliminates the
14 concern expressed by the Oversight Committee that the way
15 the Official Form was drafted permitted “double-dipping.”²⁵

16 ²⁵ “Section 707(b)(s)(A)(ii) of the code is clear and leaves no room for
17 interpretation. It delineates calculation methods for two categories of a
18 debtor’s expenses. The two categories of deductions are those set out in the
19 National Standards and Local Standards as issued by the Internal Revenue
20 Service. . . . Under the first category of deductions, which applies, among
21 other things, to transportation expenses, the “debtor’s monthly expenses *shall*
22 *be* the debtor’s applicable expense amounts specified under the Internal
23 Revenue Service National Standards and Local Standards” (emphasis
24 added). The IRS National Standards provide a specific allowance for food,
25 clothing, household supplies, and personal care, depending on income and
26 household size. The IRS Local Standards specify an amount for housing and
27 utilities expenses and a separate amount for transportation expenses,
28 depending on location. Though the amount of transportation expenses
permitted under the IRS Local Standards sets a cap on actual expenses in the
context of tax laws, the Act’s plain language entitles a debtor to an
allowance for this amount for purposes of calculating the means test in the
same way that the Act provides an allowance for food and clothing expenses.
This meaning is underscored by the provision immediately following, which
applies to other expenses.

Under the same subparagraph of §707(b)(2)(A)(ii), the “debtor’s actual
monthly expenses for the categories specified as Other Necessary Expenses
issued by the Internal Revenue Service for the area in which the debtor
resides . . .” (Emphasis added) are authorized as allowable deductions. The
language of this provision is equally unequivocal and, unlike food and
transportation expenses, requires itemization of “other necessary” expenses

Line 11, "Local transportation expenses," are divided into the categories used by the IRS: Line 12 for "Vehicle operation expense," and Line 13, "Vehicle ownership or lease expense." The Debtors then engage in the same exercise as for housing expenses. Debtors may claim the Standards amount for "Vehicle operation expense" for up to two vehicles on Line 12. On Line 13a, the debtor is directed to enter "Ownership or leasing costs using IRS Local Standard." Then, on Line 13b the average monthly payment is deducted from the Standards amount for ownership, leaving the net, either zero or some dollar amount, on Line 13c as the "Net Vehicle ownership or lease expense."

actually incurred by the debtor. The juxtaposition of the two provisions in the same sentence makes clear that Congress deliberately adopted different methods of calculating these two types of expense deductions. In the first category a debtor may include an allowance for food, clothing, transportation, household supplies, and personal care specified in the IRS standards; in the second category a debtor may include other necessary expenses only to the extent actually incurred by the debtor. (Fn "The House Judiciary Committee Report on S. 256, Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, explains the operation of this provision and says: "[T]he debtor's monthly expenses . . . must be the applicable monthly amounts set forth in the Internal Revenue Service Financial Analysis Handbook as Necessary Expenses under the National and Local Standards categories and the debtor's actual monthly expenditures for items categorized as Other Necessary Expenses." H.R.Rept.No.109-31(Part 1)(2005).)

The Advisory Committee's overarching obligation in developing the Official Forms was to faithfully execute the Act's language. The Act's language governing the calculation of deductions for transportation expenses in entry line 22 is clear and compelling." *Oversight of the Implementation of the Bankruptcy Abuse Prevention and Consumer Protection Act: Hearing Before the Subcomm. on Administrative Oversight and the Courts of the S. Committee on the Judiciary*, 109th Cong. (2006), 156.

"The second concern suggests a possible double counting of a debtor's mortgage expenses as part of the means-testing calculations. Each debtor is entitled to a housing and utilities allowance as determined by the IRS. But because the debtor is also entitled to a deduction for actual mortgage payments, the means-testing form (Official Form B22A) reduces the IRS allowance by the actual mortgage payment to prevent double counting. The form is consistent with the statutory requirement, giving effect both to a debtor's mortgage payments actually made and the general housing and utilities allowance without double counting." *Id.*, 178

1 This amount includes no payment on debt; the entire payment on
2 the debt is listed later and deducted from income on Line 33.

3 The applicable amount specified in the Standards is
4 determined by the debtor's household size and geographical
5 location and is unrelated to monthly debt payments. The
6 Standards are assuredly not a cap because secured debt is listed
7 on Line 33 and deducted from the Standards amount. This way the
8 Official Form tracks the statute. Congress was concerned about
9 debtors "double dipping" the deduction of the entire applicable
10 Standards amount and then another deduction for the secured
11 payment on Line 33.

12 Application of the Standards under the plain language
13 of §707(b)(2) is limited by decisions in the two U.S.
14 Supreme Court cases, *Ransom v. FIA Card Services, N.A.* (*In*
15 *re Ransom*), 562 U.S. 61, 69-70 (2011) (in order for a
16 Standard to be "applicable," the debtor had to actually
17 incur some expense in that category), and *Hamilton v.*
18 *Lanning*, 560 U.S. 505, 519-27 (2010) ("projected disposable
19 income" is debtor's disposable income, taking into account
20 changes certain or virtually certain to occur). The Ninth
21 Circuit more finely-tuned "good faith" in *Drummond v. Welsh*
22 (*In re Welsh*), 711 F.3d 1120, 1134 (9th Cir. 2013), holding
23 that there is no lack of good faith for merely continuing
24 to pay secured creditors for "luxury" items.

25 Based on the Means Test, the chapter 13 debtor proposes a
26 plan payment. Upon a timely objection by the chapter 13 trustee
27 or holder of an allowed unsecured claim, and unless the plan
28 pays 100% of the allowed unsecured claims, the court must

1 inquire whether the debtor is devoting all "projected disposable
2 income" to plan payments.²⁶ The Debtor here is an "above-median-
3 income debtor."²⁷ Her "projected disposable income" is determined
4 under §707(b)(2) which, as we have seen, incorporates the
5 Standards.

6 Only the chapter 13 trustee or an allowed unsecured
7 claimant may bring an objection to confirmation raising
8 §1325(b)(1)(B). The objector has the initial burden of
9 proof to show that the debtor is not applying all
10 disposable income to plan payments. *Itule v. Heath (In re*
11 *Heath)*, 182 B.R. 557, 560-61 (9th Cir. BAP 1995) (citations
12 omitted). The burden then shifts to the debtor, "as the
13 party with most access to proof on the point, to show . . .
14 that the objection lacks merit." *In re Crompton*, 73 B.R.
15 800, 809 (Bankr. E.D. Pa. 1987) (citation omitted).

16 **II. The Debt Secured by the Automobile is a "Vehicle-**
17 **Ownership" Expense.**

18 The Trustee logically argues, "an interpretation of a
19 code section should not create a result wherein the Debtor
20 gets more than they need. If so, then she is not paying
21 the 'maximum' she can afford." However, §707(b)(2) mandates

22 ²⁶ The 1984 amendment of the Code subsumed the good faith factors of
23 §1325(a) into "ability to pay" under §1325(b) for confirmation. 8 *Collier on*
24 *Bankruptcy* ¶1325.11[1]. The ability to pay test became a "floor and a
25 ceiling" for payments. If more than an affordable amount was proposed, the
26 plan would not meet the "feasibility" test. BAPCPA changed the inquiry from
the debtor's actual income and expenses to create a "bright line test"
employing §1325(b), rather than the good faith test, to determine whether the
plan met the disposable income test. *Id.* ¶1325.11[2].

27 ²⁷ An "above median income" debtor has an annual income more than the
28 median family income of the state in which they live and based on their
household size.

1 certain allowed expenses "shall be" the Standard.
2 Predictably, removing discretion in favor of a standardized
3 schedule of allowed expenses may result in occasional
4 anomaly. This issue was raised on December 6, 2006, before
5 a hearing by the Senate Judiciary Committee's Subcommittee
6 on Administrative Oversight and the Courts. *See, Oversight*
7 *of the Implementation of the Bankruptcy Abuse Prevention*
8 *and Consumer Protection Act: Hearing Before the Subcomm.*
9 *on Administrative Oversight and the Courts of the S.*
10 *Committee on the Judiciary*, 109th Cong. (2006) (the
11 "Oversight Committee"). In response, the Committee on
12 Rules of Practice and Procedure of the Judicial Conference
13 of the U.S. (the "Rules Committee") explained that it
14 wrestled with the "shall" and the "notwithstanding"
15 language when drafting the Official Forms. The Rules
16 Committee could have sensibly reconciled this by providing
17 the debtors with the benefit of the Standards amount, or
18 allowance, and the secured debt. It considered that
19 harmonization with the Code, however, explaining its
20 reasoning, said:

21
22 The [Rules] Committee rejected these arguments as
23 creating a situation in which debtors could "double
24 dip" in a manner that did not seem to the Committee to
25 be consistent with the intent of Congress even if a
26 statutory construction argument could be asserted in
27 support of such a position.

28 A debtor who opts to live in a very cramped
apartment in order to save money to cover the costs of
parochial school for his or her children would be
penalized under the proposal [to limit the Standard to
the actual expense].

1 The uniform application of the IRS Standards
2 leaves these lifestyle choices to the debtors rather
3 than imposing an obligation on the courts to make
4 decisions about the propriety of any particular
5 expenses being allowed or disallowed. *Id.*, 182-83.

6 The Trustee does not cite any authority for his contrary
7 proposition that the definition of “applicable” should be
8 narrowed to exclude, as an “applicable” expense, the
9 payments on the Automobile Loan.

10 This argument raises an issue of first impression in
11 the Ninth Circuit. The court begins with the plain meaning
12 of the statute. *Lamie v. U.S. Trustee*, 540 U.S. 526, 534
13 (2004). Second, the court will refer to the Rules of
14 Bankruptcy Procedure and the Official Form.²⁸ Finally,
15 where the plain meaning of a statute *cannot* be determined
16 by using the canons of statutory interpretation,²⁹ then
17 legislative history and analogies to decisions by the
18 Supreme Court, the Ninth Circuit Court of Appeals, District

19

²⁸ “The Bankruptcy Rules and Forms govern procedure in cases under title
20 11 of the United States Code. The rules shall be cited as the Federal Rules
21 of Bankruptcy Procedure and the forms as the Official Bankruptcy Forms. These
22 rules shall be construed to secure the just, speedy, and inexpensive
23 determination of every case and proceeding.” FRBP 1001.

24 “As a general matter, the Code defines the creation, alteration or
25 elimination of substantive rights but the Bankruptcy Rules define the process
26 by which these privileges may be effected.” *In re Hanover Indus. Mach. Co.*,
27 61 B.R. 551, 552 (Bankr E.D. Penn. 1986);

28 The Official Bankruptcy Forms and the Federal Rules of Bankruptcy
29 Procedure are intended to govern procedures in cases under the Code, and they
30 enjoy a presumption of validity. See Fed. R. Bankr. P. 1001; Fed. R. Bankr.
31 P. 9009 (forms shall be construed to be consistent with the Rules and the
32 Code); *Schwab v. Reilly*, 560 U.S. 770, 779 n. 5 (2010) (“The forms, rules,
33 treatise excerpts, and policy considerations . . . must be read in light of
34 the Bankruptcy Code provisions that govern this case, and must yield to those
35 provisions in the event of conflict.”)

36 ²⁹ *In re Schwartz-Tallard*, 803 F.3d 1095, 1103 (9th Cir. 2015) (“When the
37 language of a statute is ambiguous, canons of statutory interpretation are
38 useful rules of thumb to help courts determine the meaning of legislation.”)

1 Courts, and the Ninth Circuit Bankruptcy Appellate Panel,
2 should be employed.³⁰ Only if §707(b) and the Official Form
3 cannot be reconciled concerning the use of the incorporated
4 IRS National and Local Standards will the court consult the
5 IRM.³¹

6 The unpublished case, *In re Tydingco*, 2016 WL 1033878
7 (No. 1:14-bk-00070, Bankr. D. Guam, Jan. 27, 2016), is a
8 good example of a court consulting the IRM. The *Tydingco*
9 court had to reconcile the mandatory language of §707(b)(2)
10 with the fact that 2012 the IRS stopped providing Local
11 Standards for Guam. The creditor argued that the 2011
12 Local Standards should be applied, while the debtors said
13 their monthly expenses should be determined using the
14 current Local Standards for a similar state, such as
15 Hawaii. The court rejected the creditor's position, saying
16 that the IRS did not simply stop updating the Local
17 Standards, but has "jettisoned them entirely." *Id.*, *7.

18
19 ³⁰ See, *Strother v. Southern California Permanente Medical Group*, 79
20 F.3d 859, 865 (9th Cir. 1996) ("When interpreting state law, federal courts
21 are bound by decisions of the state's highest court. 'In the absence of such
22 a decision, a federal court must predict how the highest state court would
decide the issue using intermediate appellate court decisions, decisions from
other jurisdictions, statutes, treatises, and restatements as guidance.")
(Citations omitted.)

23 ³¹ The Supreme Court has said,

24 Although the statute does not incorporate the IRS's
25 guidelines, courts may consult this material in interpreting the
26 National and Local Standards; after all, the IRS uses those
27 tables for a similar purpose—to determine how much money a
28 delinquent taxpayer can afford to pay the Government. *The*
guidelines of course cannot control if they are at odds with the
statutory language. *Ransom v. FIA Card Services, N.A.*, 562 U.S.
at 72, *emphasis added.*
Ransom v. FIA Card Services, N.A., 562 U.S. 61, 74 (2011).

1 Likewise, the court disapproved the debtors' approach,
2 finding that, "[i]t would be very difficult to accurately
3 select a similar state," and noting that the IRM advises IRS
4 agents against this solution.³² *Id.* The court, instead,
5 permitted the debtors to deduct their actual "reasonably
6 necessary expenses that would otherwise be covered in local
7 standards." *Id.*, *7.³³ Citing *Ransom*, the court said:

8
9 To the extent that the IRM provides that the
10 "submission of living expenses should generally be
11 accepted, provided they are reasonable" in U.S.
12 Territories, the IRM matches the Bankruptcy Code for
13 below-median income debtors and the Court's holding for
14 above-median debtors in the absence of local
15 standards. See IRM §5.15.1.7(2). Of course, because
16 the Bankruptcy Code expresses a contrary mandate for
17 the rest of the means test—that expenses *shall be* the
18 national expenses—the code controls the IRM in all
19 other respects.

20 *Id.*, emphasis original.

21 Because Lopez' monthly income was about \$660 over the
22 "median," she used §707(b)(2) to calculate her "monthly
23 disposable income" available to pay unsecured creditors.
24 According to her amended Means Test, this sum was \$548.05.
25 The Debtor has proposed a plan with payments of her total
26 net income, as shown in schedules I and J, of \$1,415.65,
27 for 60 months. This amount will pay the Debtor's secured

28
³² The court also declined the debtors' suggestion that the court adjust
the 2011 Local Standards for inflation.

³³ The exception was the Local Standards for vehicle expenses, because
those standards are national and regional in character, with Guam being part
of the West region of the U.S. Census Bureau. *Id.*, at *8.

1 debt, unsecured priority debt, and a 7.34% dividend to
2 general unsecured creditors.

3 According to the Trustee, the Debtor's plan would
4 result in a *pro rata* distribution to unsecured creditors of
5 \$21,291.21,³⁴ however without the "vehicle-ownership expense"
6 the Debtor's "monthly disposable income" would be \$808.67
7 resulting in a *pro rata* distribution to unsecured creditors
8 of \$48,520. Citing several published and unpublished out-
9 of-circuit cases, the Trustee's asserts that, because the
10 Automobile Loan was incurred within a year of filing and
11 was not used to purchase the Automobile, the Debtor is not
12 entitled to the Standards' vehicle-ownership expense.³⁵ The
13 Trustee contends that the monthly Automobile Loan payment
14 should be included on Line 33 as "other secured debt" on the
15 Means Test. (As explained *supra* the debt is to be included
16 on Line 33 in any case.) If the Trustee's position was
17 accepted, the Debtor would be deprived of the difference
18 between the Standards amount for the vehicle-ownership
19 expense on Line 13 of \$517 and her actual Automobile Loan
20 payment of \$ 256.48.

21 Courts have straddled the issue of the treatment of
22 non-purchase money security interest loans secured by

23
24 ³⁴ The Trustee contends that based on the Debtor's amended Means Test
25 her plan must provide \$32,883 to unsecured creditors instead, and so,
26 regardless of the outcome here, the plan cannot be confirmed. The Debtor
initially claimed a deduction of \$200 a month for her grandchildren's benefit,
however in response to the Trustee's objection the Debtor has agreed to
increase her plan payments by \$200 per month.

27 ³⁵ The Trustee does not argue that the Debtor's plan was filed in bad
28 faith and so the proximity in time of the debt at issue is not relevant to
the analysis.

1 vehicles. The analysis in these decisions is often muddled
2 by reference to various portions of the IRM when the issue
3 before these courts was actually the debtor's good faith.
4 Post-*Ransom*, some courts have held that non-purchase money
5 auto loans do not qualify as an "applicable expense."³⁶
6 Those decisions, however, are driven by the debtor's lack
7 of good faith, not the reasoning of *Ransom*.

8 For example, in *In re Alexander*, 2012 WL 3156760
9 (Bankr. W.D. Mo. August 1, 2012), only *four days* before
10 filing bankruptcy the debtors took out a \$513 loan secured
11 by one of their cars and then asserted entitlement to the
12 vehicle ownership deduction resulting in negative
13 disposable income. The debtors' plan proposed no payment to
14 their unsecured creditors. *Id.*, at *4. In another case,
15 *In re Sires*, 511 B.R. 719 (Bankr. S.D.Ga. 2014), the court,
16 with little analysis, decided against the debtor with a \$74
17 monthly payment on a non-purchase money debt against the
18 vehicle and who proposed no payment to unsecured creditors.
19 The court referred to decisions by other courts that "based
20 their opinion on language contained in the IRM interpreting
21 the National and Local Standards" as to whether or not the
22 debtors were entitled to the "vehicle-ownership expense".
23 *Id.*, 724. As explained, *supra*, reference to the IRM is not
24 appropriate in determining the issue presented to the
25 court. The language of the IRM and other IRS materials are
26 internally inconsistent regarding the scope of the

27 ³⁶ See, e.g., *In re Alexander*, 2012 WL 3156760 (Bankr. W.D. Mo.); *In re*
28 *King*, 497 B.R. 161 (Bankr.N.D.Ga.2013); *In re Sires*, 511 B.R. 719 (Bankr.
S.D.Ga.2014).

1 applicable expense and, given the latitude delegated to IRS
2 agents, not likely to have been intended to create a bright
3 line. Likewise, in *In re King*, 497 B.R. 161 (Bankr.
4 N.D.Ga. 2013), the court had before it a debtor who, forty-
5 one days before the filing, incurred a \$585.20 title lien
6 secured by a ten-year old automobile. The chapter 13
7 trustee did not raise a good faith issue and the court
8 followed the reasoning in the *Alexander* case, simply
9 finding that the title lien was not an applicable expense.

10 The Trustee's argument must rely on the reasoning in *Ransom*;
11 to prevail he must convince the court that the Debtor, like
12 Ransom, does not have an "applicable" expense. Ransom owned the
13 vehicle free and clear and therefore had no payment on any debt
14 secured by the vehicle. Here, the Debtor must make payments on
15 the debt secured by her Automobile. The court must decide
16 whether the Debtor has an "applicable" expense for the purposes
17 of § 707(b)(2)(A)(ii)(I), which is the case if "the debtor will
18 incur that kind of expense during the life of the plan." *Ransom*,
19 562 U.S. at 70, *emphasis added*. The payment on a debt secured
20 by a vehicle, during the life of the plan, is "that kind of
21 expense" in this case.

22 A court in a different division of the same Northern
23 District of Georgia as the court in *King*, came to the opposite
24 conclusion in a reported decision three years later in *In re*
25 *Feagan*, 549 B.R. 811, 819 (Bankr. N.D.Ga. 2016). There, the
26 debtor owed \$3,085 on his car to a pawnbroker and had to pay
27 \$51.43 per month to retain the car. The court in *Feagan* decided
28 that reference to the IRM for resolution was unhelpful.

1
2 A review of these parts of the IRS statements on
3 the subject reveals that, in some places, the
4 materials describe Ownership Costs as “monthly loan or
5 lease payments.” In other places, the materials refer
6 to Operating Costs as “monthly allowances for the lease
7 or purchase” of automobiles or a “vehicle payment
8 (lease or purchase).”

9 So how does an IRS employee decide whether
10 payments on a nonpurchase-money obligation are
11 allowable as an Ownership Cost? Perhaps the employee
12 consults a lawyer who parses the language of the text
13 as a matter of statutory construction and applies
14 various maxims to conclude that the specific
15 references to the “lease or purchase” of a vehicle
16 require a conclusion that nonpurchase-money
17 obligations are excluded.

18 *In this Court's judgment, the IRS Standards and*
19 *interpretive materials should not be interpreted in*
20 *the way that courts and lawyers read statutes. The*
21 *reason is that, unlike statutes in general and the*
22 *provisions of the means test in particular, the IRS*
23 *interpretive materials and the Standards themselves do*
24 *not establish mandatory rules that IRS employees must*
25 *follow.*

26 *Id.*, 817, *emphasis added.*

27 *Feagan* isolated the issue as, “[W]hether the Ownership
28 Costs Standard-and by extension the [projected disposable income]
test-treats car payments differently depending on whether the car
is encumbered by a nonpurchase-money obligation.” *Id.*, at 819.
In *Feagan*, the chapter 13 trustee made the same objection to
confirmation made here. The *Feagan* court analyzed *Ransom* in
depth and determined that its decision was consistent with
Ransom.

Based on these observations, *Ransom* could require
a conclusion that a debtor who must pay a
nonpurchase-money obligation to retain a car has an
expense within the Ownership Costs category and that,

1 therefore, the category is “applicable” to him under
2 the statutory language of §707(b)(2)(B)(i)(I).

3 Either argument is sensible. Because the question
4 of whether the Operating Costs category covers
5 nonpurchase-money obligations was not before the
6 *Ransom* Court, however, the language it used to
7 describe what the category covers does not control the
8 issue one way or another. The Supreme Court discussed
9 only the issue before it; if the Court thought that it
10 was addressing this issue, nothing in the opinion
11 makes that clear.

12 *Feagan*, 549 B.R. at 816.

13 After determining that *Ransom* did not suggest a different
14 outcome, *Feagan* proceeded to analyze the issue, overruling the
15 Trustee’s objection and confirming the debtor’s plan.

16 In considering Congressional purpose in context
17 of that issue, the proper focus is not on the
18 Congressional intent to make a debtor pay the maximum
19 he can afford. Rather, the inquiry properly focuses on
20 the intent to establish a formula to determine “amounts
21 reasonably necessary to be expended” for purposes of
22 the [projected disposable income] test. See *Ransom*,
23 562 U.S. at 65, 131 S.Ct. at 721-22. The *Ransom* Court
24 observed that BAPCPA’s means test provisions
25 supplanted pre-BAPCPA practice that calculated
26 reasonable expenses on a case-by-case basis, with
27 “varying and often inconsistent determinations.” *Id.*

28 Congress defined categories of reasonable
 expenses. One of them is an allowance for Ownership
 Costs that is applicable to a debtor with a car
 payment. The purpose of that must be to permit the
 debtor to keep the car so that he has necessary
 transportation. To accomplish that objective, it makes
 no difference whether the debt is purchase-money or
 non-purchase money—the debtor must make the car
 payments to keep the car. If Congressional purpose is
 relevant to determination of the question at all,
 treating both types of encumbrances the same way
 furtheres the Congressional purpose of permitting a
 debtor’s retention of an encumbered car. *Id.*

1 In an unpublished order the district court reversed and remanded
2 the *Feagan* case, concluding that the debtor was not entitled to
3 claim the loan payment as a "vehicle-ownership expense". That
4 district court cited *Ransom*, then turned to the IRM, Section
5 5.8.5.22.3, "[expenses are allowed for purchase or lease of a
6 vehicle], saying, "This conclusion follows from the specific
7 language used in the IRM coupled with the policy reasons for the
8 enactment of BAPCPA outlined in *Ransom*." *Id.*, *18-19. *In re*
9 *Feagan*, 4:16-CV-00108-HLM, (N.D.Ga., Sept. 6, 2016).³⁷

10 This court respectfully disagrees with the district court
11 reversal. The district court appears to have relied on the IRM.
12 This court is persuaded by the well-reasoned decision of the
13 *Feagan* bankruptcy court and agrees there is no authority in the
14 Code or Standards to treat purchase-money and non-purchase-money
15 loans secured by vehicles differently. In *Feagan* it might have
16 been appropriate to deny confirmation for bad faith (although
17 the bankruptcy court specifically stated that the trustee had
18 made no such suggestion, *id*, fn. 14). This court is convinced
19 that the Automobile Loan should not be treated differently for
20 Means Test purposes based solely on the fact that it is a
21 refinancing or equity type of transaction instead of a purchase-
22 money or lease transaction.

23 In an unpublished summary order denying confirmation in the
24 case, *In re Carroll*, 12-41350 (Bankr. Idaho, April 15, 2013),
25 the court concluded that a "title loan" was not an "applicable
26 expense" for Means Test purposes. That court based its

27
28 ³⁷ WestLaw shows the case, *In re Feagan*, 549 B.R. 811, as having no
history and there is no indication, there, that the case was reversed and
remanded.

1 conclusion on the characteristics of "title loan" as a "short-
2 term loan with a high interest rate." *Id.* *1. It noted that
3 the debtors had "pawned" their automobile on more than one
4 occasion, using the collateral in the vehicles "to obtain cash
5 to help make ends meet." *Id.* *5. The court also referred to
6 the IRM, which it found "not exactly clear on this point." *Id.*
7 *3. Admitting it was a "close call," the *Carroll* court was
8 persuaded that the intent of the deduction was to accommodate
9 the costs of acquiring a vehicle. *Id.* *4. As explained, *supra*,
10 this court is not so persuaded.

11 The most recent Ninth Circuit guidance related to this
12 issue is the Bankruptcy Appellate Panel's unpublished opinion, *In*
13 *re Drury*, 2016WL4437555, BAP No. CC-15-1441, Bk. No. 2:15-bk-
14 17125 (Aug. 23, 2016), reversing the decision of the bankruptcy
15 court. Although the issue presented in *Drury* was slightly
16 different, and *Drury* is unpublished, the reasoning of the BAP
17 informs the court's decision here. In *Drury*, the debtor used a
18 car that had been purchased by her sister. The debtor made the
19 payments on her sister's loan which was secured by that car. In
20 *Drury's* chapter 7 case, the U.S. Trustee, while acknowledging
21 that if *Drury* ceased making the payments she would lose the
22 vehicle, argued that, as a matter of law, *Drury* was prohibited
23 from taking the vehicle-ownership expense because she was not
24 legally obligated on the debt. *Id.*, *6.³⁸ The *Drury* Panel
25 concisely posed this question: "When a debtor does not own an
26 automobile but makes monthly lease or loan payments as a

27
28 ³⁸ The Trustee argues that *Drury* supports his position, however the
court is not so persuaded.

1 *prerequisite to his or her continued possession and use of a*
2 *vehicle, may the debtor claim an expense allowance under the*
3 *means test for car 'ownership' expenses?" Id., *1, emphasis added.*
4 The BAP answered "yes." [I]t is undisputed that Drury will lose
5 possession of the automobile unless she continues to make
6 payments to the lender. This undisputed fact establishes for
7 means test purposes that the relevant IRS local transportation
8 expense standard of \$517 for car ownership expenses is
9 "applicable" to Drury and thus she is entitled to claim this
10 amount for purposes of determining whether her chapter 7 case
11 filing was presumptively abusive under §707(b)(2). *Id.*, *2.

12 The BAP did mention the IRM in passing, but, consistent
13 with the bankruptcy court in *Feagan*, found nothing dispositive.
14 This court's conclusion is consistent with the BAP's *Drury*
15 decision. It is undisputed that the Debtor will "lose possession
16 of the automobile unless she continues to make payments to the
17 lender," and thus the relevant Standards expense is "applicable"
18 to the Debtor. *Id.*; *Ransom*, 562 U.S at 69.

19 The plain meaning of the statute, consistently interpreted
20 with the language in the Official Form, leads to the reasonable
21 conclusion that the Debtor has an "applicable expense" for
22 purposes of the vehicle-ownership expense" deduction. The IRS's
23 use of the Standards differs in policy and purpose from its
24 application by the Bankruptcy Code, as explained *supra*. The
25 court relies on "the text, context, and purpose of the statutory
26 provision," as did the Supreme Court in *Ransom*, 562 U.S. at 64.
27 The Supreme Court in *Ransom* did not mandate a court's
28 consultation of the IRM. *Id.*, 72 ("[C]ourts may consult the

1 material in interpreting the National and Local Standards."

2 *Emphasis added.*) The IRM is not helpful here.

3 The Debtor has a vehicle encumbered by a car loan, a
4 legitimate ownership expense albeit not a purchase-money
5 expense. Here, the trustee asks the court to narrow the meaning
6 of "applicable" by confining it to purchase-money debts.
7 However, the Trustee provides no basis in the law supporting
8 this limitation and the court is not persuaded that such
9 narrowing is consistent with congressional intent in BAPCPA.
10 Nothing in the National or Local Standards or the Code imposes a
11 "purchase-money loan" restriction on the debtor.³⁹ Because the
12 court is persuaded that the debtor is entitled to take the
13 Standards amount for "vehicle-ownership" the court must decide
14 whether that Standard is a "cap" or an "allowance."

15 **III. The "Vehicle-Ownership" Expense of §707(b) is an**
16 **"Allowance," Not a "Cap."**

17 The Trustee's alternative argument has been addressed by
18 bankruptcy courts in the Ninth Circuit as well as by other
19 circuit courts. But, there is no precedent that binds this
20 court to either classification. There is no need to refer to
21 the IRM to resolve the issue because both the statute and the
22 Official Form are clear and unambiguous. The two fit easily
23 together to arrive at a result that is logical and consistent
24 with the intent of Congress. The statute provides that the

25 ³⁹ The *Ransom* court acknowledged that the Means Test is, by its nature,
26 "over-and under-inclusive". *Ransom*, 562 U.S. at 78. The trustee here has not
27 shown that the Standards or the IRM clearly exclude non-purchase money loan
28 payments from "ownership expenses." Rather, the trustee urges bisection and
exclusion of a type of "ownership expense" (loan payments) prior to including
the deduction from disposable income without direct support.

1 debtor's monthly expenses *shall be* the amounts under the
2 Standards (an allowance); after deducting the secured payment
3 that permits the debtor to claim an applicable amount from the
4 Standard amount, the debtor is instructed to enter the entire
5 secured debt on Line 33. Logically, if the Standards amount was
6 a cap, the debtor would not be able to enter the entire debt
7 payment on Line 33. In that case the debtor would be unable to
8 both, confirm a feasible plan, and comply with Congressional
9 intent that secured creditors be paid. (*See, Drummond v. Welsh*
10 (*In re Welsh*), 711 F.3d at 1133-34.

11 When the Oversight Committee expressed concerns about the
12 possibility debtors would "double dip," the Rules Committee
13 explained, that possibility is eliminated because debtors deduct
14 their actual payment on their real property or vehicle from the
15 allowance and are only allowed the difference. Accordingly, if
16 the payment on the secured debt is more than the allowance, the
17 amount shown on the line for the Standards would be zero. If
18 the Standards amount was a cap, double dipping would not have
19 been a concern. On the Official Form no debt is included as an
20 expense under the Standards amounts and thus no "double-
21 dipping."

22 Before *Ransom*, several circuit courts held that debtors
23 could deduct the "vehicle-ownership" Standard amount even if they
24 owned their automobiles outright. Section 707(b)(2)(A)(ii)(I)
25 reads:

26 The debtor's monthly expenses *shall be* the
27 debtor's *applicable monthly expense* amounts *specified*
28 *under the National Standards and Local Standards*, and
the debtor's *actual monthly expenses* for the
categories specified as Other Necessary Expenses
issued by the Internal Revenue Service

1 *Id.*, *emphasis added*.

2 Those courts distinguished the term “applicable” from
3 “actual,” reasoning that Congress had purposely used these two
4 different terms in the same statute when referring to expenses
5 determined under the National and Local Standards, and those in
6 the “Other Necessary Expenses” category. *In re Coffin*, 435 B.R.
7 780 (1st Cir. BAP 2010) (term “applicable” as used in the “means
8 test” had to be contrasted with the term “actual” as used
9 elsewhere in the same provision, and did not require that debtor
10 *actually* have such an expense.); *In re Pearson*, 390 B.R. 706
11 (10th Cir. BAP 2008) (above-median-income debtors entitled to
12 deduct “vehicle-ownership expense” for vehicle owned outright-
13 “applicable” not equated with “actual,” as used in permitting
14 debtors to deduct “actual monthly expenses” for Other Necessary
15 Expenses.); *In re Kimbro*, 389 B.R. 518 (6th Cir. BAP 2008)
16 (“applicable” had to be contrasted with “actual” and did not
17 require debtors to genuinely have such an expense.). Although
18 *Ransom* ended this line of decisions, that analysis remains
19 persuasive. *Ransom* held that the word “applicable” meant that
20 the debtor had to *actually incur some expense in this category*
21 in order to deduct the Standards “vehicle-ownership” cost. As
22 the court observed in *Lynch v. Jackson (In re Jackson)* 853 F.3d
23 116 (4th Cir. 2017):

24 In *Ransom v. FIA Card Servs.*, 562 U.S. 61, 131
25 S.Ct. 716, 178 L.Ed.2d 603 (2011), the Supreme Court
26 was tasked with interpreting 11 U.S.C. §
27 707(b)(2)(A)(ii)(I). It held that an expense is
28 “applicable,” as used in §707(b)(2)(A)(ii)(I), “only if
the debtor will incur that kind of expense during the
life of the plan.” *Ransom*, 562 U.S. at 70, 131 S.Ct.
716. However, the Court expressly declined to reach

1 the issue of “the proper deduction for a debtor who has
2 expenses that are lower than the amounts listed in the
Local Standards.” *Id.* at 75 n. 8 (*emphasis in*
3 *original*).

4 This court must now address the issue that the
Supreme Court declined to reach in *Ransom*. Based on
5 the plain language of the statute, we hold that a
debtor is entitled to deduct the full National and
6 Local Standard amounts even if they have actual
expenses below the standard amounts.

7 *Id.* at 121.

8
9 The Trustee is correct that if the Official Form is
10 inconsistent with the Code, then the Code prevails-and that
11 the Official Form has been changed in the past to be
12 consistent with Supreme Court decisions. The Trustee cites
13 several cases where courts have decided the Official Form
14 was inconsistent with the Code. The Trustee also concedes
15 the Official Forms should be construed to be consistent
16 with the Federal Rules of Bankruptcy Procedure and the
17 Code.

18 In *In re Wiegand*, 386 B.R. 238, 241-42 (9th Cir. BAP
19 2008), the BAP said that a business debtor could not deduct
20 business expenses before the median-income test was
21 applied. The Official Form permits the debtor to deduct
22 the business expenses from the gross income, before the
23 determination of above or below-median income is made.
24 This Official Form directly conflicted with the Code in
25 *Wiegand*, because §1325(b)(2)(B), “provides that business
26 deductions are taken from the debtor's *current monthly*
27 *income* to arrive at disposable income under § 1325(b)(2).”
28 *Id.*, *emphasis added*.

1 The only circuit court of appeals to date that
2 squarely addressed the “cap” or “allowance” issue presented
3 to this court appears to be the January 2017 opinion in
4 *Lynch v. Jackson*, 853 F.3d at 116. This appeal from the
5 bankruptcy court’s denial of a motion to dismiss the debtor’s
6 chapter 7 case for abuse was certified for direct appeal in
7 order to resolve a split among the courts in that circuit.
8 The *Lynch* court framed the issue:

9 We granted the appeal as to the following
10 question: whether 11 U.S.C. §707(b)(2) permits a debtor
11 to take the full National and Local Standard amounts
12 for expenses even though the debtor incurs actual
13 expenses that are less than the standard amounts. We
14 conclude that debtors are entitled to the full
National and Local Standard amount for a category of
expenses if they incur an expense in that category.

15 *Lynch v. Jackson*, 853 F.3d at 116.

16 In *Lynch v. Jackson* there was no dispute that the
17 debtors had correctly followed the instructions in
18 completing the Means Test. Relying on the plain language
19 of the statute, the rules of statutory interpretation, and
20 *Ransom*, the court made short work of the Bankruptcy
21 Administrator’s argument, that the efforts of the debtors
22 were futile because those instructions were incorrect.
23 Here, the language is quite clear. Once an expense is
24 incurred [under the holding in *Ransom*], the “[t]he debtor’s
25 monthly expenses *shall be* the debtor’s applicable monthly
26 expense amounts *specified* under the National Standards and
27 Local Standards.” 11 U.S.C. § 707(b)(2)(A)(ii)(I) (*emphases*
28 *supplied*). A debtor is entitled to take the full amount of

1 the National and Local Standards if they incur an expense
2 in that category. *Id.*, 120, *emphasis original*.

3 While not binding precedent on this court, the court is
4 persuaded by the decision in *Lynch v. Jackson* which it finds is
5 consistent with *Ransom* and more persuasive lower court
6 decisions.⁴⁰

7 **IV. The Trustee's "Notwithstanding Clause" Argument.**

8 Section 707(b)(2)(A)(ii)(I) reads:

9
10 The debtor's monthly expenses shall be the
11 debtor's applicable monthly expense amounts specified
12 under the National Standards and Local Standards, and
13 the debtor's actual monthly expenses for the
14 categories specified as Other Necessary Expenses
15 issued by the Internal Revenue Service Such
16 [other necessary] expenses shall include reasonably
17 necessary health insurance, disability insurance, and
18 health savings account expenses for the debtor, the
19 spouse of the debtor, or the dependents of the debtor.
20 *Notwithstanding any other provision of this clause,*
21 *the monthly expenses of the debtor shall not include*
22 *any payments for debts.*

23 *Id.*, *emphasis added*.

24 The Trustee argues that since the "notwithstanding
25 clause" excludes secured debt from "expenses," the
26 Standards are inapplicable. As explained, *supra*, no
27 secured debt is included in the Standards-the amount of the

28 ⁴⁰ The legislative record also supports this conclusion. The response
to concerns raised by the Oversight Committee during the hearings illustrate
the reasoning of the Rules Committee:

"Though the amount of transportation expenses permitted under the IRS
Local Standards sets a cap on actual expenses in the context of tax laws, the
Act's plain language entitles a debtor to an allowance for this amount for
purposes of calculating the means test in the same way that the Act provides
an allowance for food and clothing expenses. This meaning is underscored by
the provision immediately following, which applies to other expenses."
*Oversight of the Implementation of the Bankruptcy Abuse Prevention and
Consumer Protection Act: Hearing Before the Subcomm. on Administrative
Oversight and the Courts of the S. Committee on the Judiciary*, 109th Cong.
(2006), 156.

1 monthly secured debt payment is subtracted from the
2 Standards amount. If a debtor will incur a debt during the
3 life of the plan in the applicable category, then they are
4 entitled to the applicable Standards amount. *See, Ransom.*
5 The debtor's monthly payment on the secured debt adjusts
6 the Standards amount downward resulting in the debtor
7 deducting at least the Standards amount.

8 In a case that supports the Trustee's argument, *In re*
9 *Fields*, 534 B.R. 126 (E.D. N.C. 2015), the court
10 interpreted the "Notwithstanding" clause as excluding any
11 debt from being deducted under the Standards on the Means
12 Test, whether it was a mortgage used to purchase a home or
13 a loan incurred to buy a car, because these were secured
14 debts, not expenses. Only lease and rent payments, for
15 example, could be included as deductions from the
16 Standards. The *Fields* court applied the plain meaning of
17 the statute without considering consistency with the
18 Official Form or referring to the IRM. The Official Form
19 directs debtors specifically to deduct the amounts of their
20 mortgage payments and car loan payments from the Standards
21 amounts while the IRM clearly contemplates inclusion of
22 mortgages and car payments in the Standards calculation.

23 The Trustee submitted a supplemental brief in support
24 of his "Notwithstanding Clause" argument including a copy
25 of the unpublished case, *In re Bartolo*, 2015 WL 1546158
26 (Bankr. E.D. N.C., Mar. 31, 2015) ("Secured debts may only
27 be deducted pursuant to [Line 33 'Other Necessary
28 Expenses']"). The court in *Bartolo* found the Local

Standards inapplicable to the debtor's home mortgage payments and, "thus, the Debtor may not take the deductions on Lines 25B and 28. The Debtor may only take those deductions on Lines 47 and 48 relating to his secured debt payments to SunTrust and Fort Bragg". *Id.* 10. *Bartolo* suggested the Official Form should be changed to "remove any reference to "mortgage" or "ownership" to clarify that the deduction is only applicable to expenses, not payments on secured debts. "These lines would thus be 'applicable' only if a debtor leased a home or vehicle, and had no secured debt that would fall into the relevant category." *Id.* Because amounts specified under the Standards are now incorporated into the Code, and because the provisions of the Code should be read harmoniously, it is more reasonable to construe the Official Form as reconciling the "Notwithstanding Clause" and the amounts specified to be deducted under the Standards, than to follow the proposition stated in *Fields* and *Bartolo*.

In a subsequent published 2015 case from the same district, *In re Jackson*, 537 B.R. 238 (Bankr. E.D.N.C. 2015), the court decided that the Official Form and the "Notwithstanding Clause" are harmonized. The *Jackson* court, agreeing with *In re Scott*, 457 B.R. 740 (Bankr. S.D. Ill. 2011), said,

The trustee's reading, the *Scott* court wrote, would require rejection of a portion of the form as "incorrectly designed," based upon a reading of the statute that failed to harmonize its various components. Because §707(b)(2)(A)(iii) "specifically addresses how secured debt payments are to be

1 calculated," the trustee's reading of the
2 "notwithstanding" sentence goes too far. The Official
3 Forms, however, synthesize the various requirements of
4 the statute." *Id.*, 745. This court agrees with the
5 *Scott* court's analysis and also with the views
6 expressed in *Collier*, which are that reading the
7 provision to preclude a debtor from claiming housing
8 or transportation ownership expense on the grounds
9 that they constitute payments for secured debt, and
10 therefore are excluded by the "notwithstanding"
11 sentence, goes too far. Arguments based on the
12 "notwithstanding" sentence do not withstand "textual or
13 policy scrutiny" *Collier* states, because the language
14 of that sentence "means simply what it says. Although
15 the IRS Other Necessary Expense standards permit
16 debtors to make payments on other secured and
17 unsecured debts, such payments are not allowed as part
18 of the means test use of the IRS standards. *The*
19 *amounts deducted under the transportation ownership*
20 *allowances are not payments for debts. They are the*
21 *'amounts specified' by the allowance.*" [6 *Collier on*
22 *Bankruptcy* p. 707.04[3][c] at 707-32 to 707-33 (16th
23 ed., Alan J. Resnick & Henry Sommer, eds.)(emphasis
24 added.)

16 *In re Jackson*, 537 B.R., 247, *aff'd*, *Lynch v. Jackson (In re*
17 *Jackson)* 853 F.3d 116 (4th Cir. 2017).

18 The chapter 13 trustee in *In re Prigge*, 441 B.R. 667
19 (D. Mont. 2010), using the "Notwithstanding Clause" of
20 §707(b)(2)(A)(ii)(I), made a "cap not allowance" argument,
21 urging the court to decide that "nothing in the disposable
22 income calculation allows the deduction for payments on
23 debt," and asking that the debtor's payments on his home
24 mortgage loan and auto loan be stricken and that he be
25 limited to only the Standards amounts for housing and
26 vehicle operating expenses. The court held that "all the
27 authorization needed is found in clause (i) of
28 §707(b)(2)(A):

1 In considering under paragraph (1) whether the
2 granting of relief would be an abuse of the provisions
3 of this chapter, the court shall presume abuse exists
4 if the debtor's current monthly income *reduced by the*
5 *amounts determined* under clauses (ii), (iii), and
6 (iv), and multiplied by 60 is not less than the lesser
7 of

8 §707(b)(2)(A)(i), emphasis original.

9 *Id.*, 673.

10 It is clause (ii) that contains the "Notwithstanding"
11 language. "The Trustee's argument that clause (ii) controls over
12 clause (iii) conflicts with common canons of statutory
13 construction and with clause (i)." *Id.* The *Prigge* court, finding
14 that "[t]he Trustee's objection . . . that the IRS Standards
15 under clause (ii) control over clause (iii) is contrary to
16 controlling Ninth Circuit authority, and based on *Egebjerg*,"
17 [*Egebjerg v. Anderson (In re Egebjerg)*, 574 F.3d 1045 (9th Cir.
18 2009)] overruled the objection. The relevant portions of the
19 Official Form have remained the same since 2005 and this court
20 will not reject the clear language in those instructions in
21 absence of an actual conflict with the Code or precedential
22 authority.

23 **V. The Trustee's Public Policy Argument.**

24 The Trustee does not argue the Debtor's petition or plan
25 were filed in bad faith. Instead, the Trustee contends that
26 permitting debtors to deduct payments made on non-purchase-money
27 car loans invites abuse. The determination of good faith in the
28 Ninth Circuit is based on a review of the totality of the
circumstances. In the absence of bad faith, debtors are
permitted to avail themselves of the protections afforded by the
Code, here, the deduction of the Automobile Loan payments under

1 the Standards. *See, Law v. Siegel*, 571 U.S. ----, 134 S. Ct.
2 1188, 1194 (2014). (Not bad faith to simply do what Code
3 permits). The Trustee's fear, that some debtors may abuse the
4 Bankruptcy Code, is not without merit, however the law provides
5 remedies for abuse or manipulation of the Code.

6 Evidence that a debtor, shortly before filing the case,
7 encumbered an asset held free and clear and used those funds
8 frivolously might result in dismissal of the case or denial of
9 confirmation. There is no evidence of any similar facts in this
10 case. Rather, it appears that the Debtor here was "honest but
11 unfortunately gullible." In April 2015, the Debtor joined an
12 internet dating website and began communicating with a "Tyler
13 Nunez." During 2015 the Debtor took out a home equity loan for
14 approximately \$90,000, obtained a car equity loan for
15 approximately \$14,000, and withdrew funds from her IRA,
16 incurring priority income tax liabilities of approximately
17 \$43,000.

18 At the time the Debtor filed this case on March 30, 2016,
19 she was indebted on the following personal loans in the
20 following approximate amounts:

21 Allied Cash Advance:	\$ 5,000;
22 Argon:	\$ 5,000;
23 Avant Credit of California:	\$23,000;
24 Borrowers First, Inc.:	\$15,000;
25 CircleBack Lending:	\$18,500;
26 Discover Personal Loans:	\$24,000;
27 Lending Club:	\$21,000;

1 LoanMe, Inc.: \$99,000;⁴¹
2 Prosper: \$20,000;
3 Safe 1 Credit Union: \$ 9,766;
4 Synchrony Bank: \$ 2,300;
5 Upstart Network, Inc.: \$34,700.

6 It appears that these personal loans were incurred between
7 April 2015, and December 2015. In the Debtor's amended Statement
8 of Financial Affairs filed June 10, 2016, Part 6, she lists 2015
9 losses due to fraud in the amount of \$462,000. Approximately
10 \$250,000 of these funds originated as personal loans. There is
11 no evidence the Debtor used these borrowed funds for her or her
12 family's personal benefit. She shows no profligate expenditures
13 in her schedules. She did not pay down her exempt homestead,
14 but instead encumbered it further, as well as re-financing the
15 Automobile.

16 According to the amended complaint filed in the Adversary
17 Proceeding, the Debtor was under the impression that "Tyler
18 Nunez," her "fiancé," was a major in the U.S. Army stationed
19 overseas, that he had discovered a large sum of money in a cave,
20 and would send the Debtor \$2.9 million if she would transfer
21 funds to an account designated by him. Between June 2 and
22 August 5, 2015, the Debtor transferred \$462,600 to a deposit
23 account in the name of "Lixuan Weng." Approximately \$212,000 of
24 this was from the Debtor's own funds- the Debtor singly incurred
25 personal losses nearly equal to those of all of her unsecured
26 lenders put together.

27 ///

28 ⁴¹ This creditor filed the adversary proceeding against the Debtor.

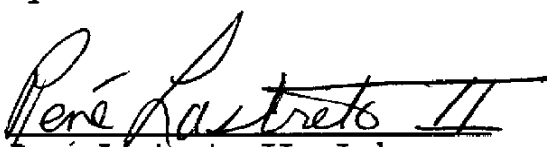
1 **Conclusion.**

2 The court's conclusion, that the payment on the Automobile
3 Loan is a "vehicle-ownership expense" and that the Standard for
4 that category is an allowance and not a cap, is consistent with
5 Ninth Circuit jurisprudence and the philosophy underlying BAPCPA
6 when it created two categories of debtors, those "below median
7 income," and those "above median income"-those eligible for
8 chapter 7 discharges and those who are required to file under
9 chapter 13 in order to obtain a discharge. Congress expressed a
10 desire for more uniformity and less discretion by courts in
11 determining what chapter 13 debtors should repay in a plan. The
12 language in the statute and the language in the Official Form
13 and its instructions are clear and can be reconciled to produce
14 a logical result. The court can use evidence of "bad acts" to
15 tame the serpents, thus keeping the "cobra effect" safely away
16 from participants in the bankruptcy process. In the absence of
17 evidence of extrinsic "bad acts" the Debtor may avail herself of
18 the provisions of the Code.

19 The objection is overruled. The Debtor's plan is
20 confirmed. A separate order will issue prepared by the Trustee
21 and signed by Debtor.

22
23
24 **Dated:** Aug 30, 2017

By the Court

25 
26 René Lastréto II, Judge
27 United States Bankruptcy Court
28

1 **Instructions to Clerk of Court**
2 **Service List - Not Part of Order/Judgment**

3 The Clerk of Court is instructed to send the Order/Judgment or
4 other court generated document transmitted herewith to the
5 parties below. The Clerk of Court will send the Order via the
6 BNC or, if checked X , via the U.S. mail.

7 Debtor(s), Attorney for the Debtor(s), Bankruptcy Trustee (if
8 appointed in the case), and X Other Persons Specified Below:

9 Ellyn D. Lopez
10 1844 Summer Drive
11 Delano CA 93215

12 Michael H. Meyer
13 PO Box 28950
14 Fresno CA 93729-8950

15 Office of the U.S. Trustee
16 United States Courthouse
17 2500 Tulare Street, Room 1401
18 Fresno CA 93721

19 Patrick Kavanagh
20 1331 L St
21 Bakersfield CA 93301